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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RAUL CABRERA ORTEGA,

Defendant and Appellant.

G042792

(Super. Ct. No. 94CF1865)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Thomas M. Goethals, Judge. Affirmed.

Richard Schwartzberg, under appointment by the Court of Appeal, for
Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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FACTS AND PROCEDURAL BACKGROUND

In 1995 defendant was charged with one count of murder and one count of premeditated attempted murder. It was also alleged he personally used a firearm, had the intent to inflict great bodily injury, and committed the crime to benefit a street gang. After a hung jury in his first trial, in January 1996 he pleaded nolo contendere to voluntary manslaughter and personal use of a firearm and the remaining charges were dismissed. He was sentenced to 11 years in prison. After completing his sentence in 2000 defendant was deported at least once and illegally reentered the country.

In the guilty plea form he initialed box 8, which read: "I understand that if I am not a citizen of the United States the conviction for the offense charged may have the consequence of deportation[or] exclusion from admission to the United States" Above his signature on that form, he initialed a statement that read, "I declare under penalty of perjury that I have read, understood, and personally initialed each item above and discussed them with my attorney"

Defendant's lawyer signed the form, stating, "I have explained each of the above rights to the defendant, and having explored the facts with him[] and studied his[] possible defenses to the charge(s), I concur in his[] decision to waive the above rights and to enter a plea of guilty. I further stipulate this document may be received by the court as evidence of defendant's intelligent waiver of these rights and that it shall be filed by the clerk as a permanent record of that waiver." The reporter's transcript for the hearing could not be found and there is no record of whether the trial judge also advised of the immigration consequences.

In September 2009 defendant filed a combined petition for writ of error *coram nobis*, motion to withdraw his guilty plea, petition for habeas corpus, and motion to amend his sentence nunc pro tunc. The basis for each was the same: before he entered his plea he was not advised of its immigration consequences and he never would have

agreed to the plea had he known he could be deported. The reason for the motion is defendant's pending deportation based on the conviction.

Defendant submitted a declaration stating he came to the United States at age one, as a lawful permanent resident, had lived here his entire life. He declared his public defenders told him he would have no immigration problems with his plea. He also submitted declarations from his brother and sister; they concurred that the public defenders gave them the same information as to defendant's immigration status. His motion includes a copy of the minute order for the hearing where he entered the guilty plea. Defendant pointed out that the box showing he was advised of the immigration consequences was not checked.

The court denied the petition and motions, ruling that under Penal Code section 1016.5, the petition was untimely, defendant having waited 13 years after his guilty plea to file it. As to the constitutionality of the guilty plea, the court found defendant had not made a prima facie case the plea was defective.

After defendant appealed we appointed counsel to represent him. Counsel filed a brief setting forth the facts of the case and the disposition. He did not argue against defendant but advised the court he had not found any issues to present on defendant's behalf. (*People v. Wende* (1979) 25 Cal.3d 436.) He suggested two issues to assist us in our independent review of the record, as set out below.

Defendant was given 30 days to file written argument on his own behalf, which he did, primarily reiterating the points initially raised in support of his petition and motions in the trial court. We examined the entire record to determine if any arguable issues were present, including those suggested by counsel and defendant, and found none. (*People v. Wende, supra*, 25 Cal.3d at pp. 441-442; *People v. Johnson* (1981) 123 Cal. App.3d 106, 111-112.)

DISCUSSION

1. Motion to Withdraw Plea and Petition for Writ of Coram Nobis

A defendant may seek to withdraw a guilty plea if he is not told of the deportation consequences of a plea. (Pen. Code, § 1016.5.) The statutory requirement is satisfied if the defendant is advised in the plea agreement instead of by the court. (*People v. Ramirez* (1999) 71 Cal.App.4th 519, 522-523.) If a defendant does not file a petition to withdraw a guilty plea before entry of judgment (Pen. Code, § 1018), the motion is treated as a petition for writ of *coram nobis* and defendant must prove he acted with “reasonable diligence” (*People v. Totari* (2003) 111 Cal.App.4th 1202, 1206-1207) and “explain and justify [a] delay []” in filing a petition (*id.* at p. 1207).

Here defendant delayed 13 years between his sentence and his motion, during which time he was deported, without any explanation for the delay in his petition. (*People v. Kim* (2009) 45 Cal.4th 1078, 1098 [petition not filed for almost seven years after the defendant first aware of possible deportation untimely].) We may not consider facts in defendant’s supplemental brief, including his alleged learning disability and errors defendant claims were made by the Immigration and Naturalization Service, that are not in the record to satisfy this requirement. The court did not abuse its discretion in denying the motion or writ petition. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192.)

2. Ineffective Assistance of Counsel

In support of his claim of ineffective assistance of counsel, defendant submitted his own declaration and declarations of siblings stating that counsel told him his plea would have no immigration consequences. Ineffective assistance of counsel is an “inappropriate ground for relief on *coram nobis*.” (*People v. Kim, supra*, 45 Cal.4th at p.

1104.) Habeas corpus is not appropriate because defendant is not in custody or on probation or parole for the crime. (*People v. Villa* (2009) 45 Cal.4th 1063, 1069-1070.)

3. Malicious Prosecution and Prosecutorial Misconduct

Counsel suggests, without any elaboration, that possible issues might be malicious prosecution or prosecutorial misconduct. We see no evidence of either in the record.

DISPOSITION

The order is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

IKOLA, J.